



U.S. Department of Justice

Civil Division

MDG:DRA:APang  
46-12C-4297

Tel. (202) 514-6846

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Washington, DC 20530

August 23, 2018

Via electronic transmission

Mr. William F. Johnson  
King & Spalding LLP  
1185 Avenue of the Americas  
New York, NY 10036

Re: *U.S. ex rel. Garbe v. Kmart Corp.*, Case No. 12-CV-881-NJR-PMF (S.D. Ill.)

Dear Bill:

You have informed counsel for the United States and Relator that your client, Kmart Corporation, wishes to sell Sears Distribution Center #8825, located at 3825 Forsyth Road, Winter Park, Orange County, FL 32792 (the "Florida Property"). The United States and Relator are joint mortgagees of the Florida Property, which currently serves as part of the security for the three Settlement Payments under Paragraph 2 of the Federal Settlement Agreement (effective December 22, 2017), and which was executed by the United States, Relator, and Kmart to resolve the above-caption False Claims Act case. Separate state agreements were executed by Participating States to resolve the state claims in the above-captioned action. In exchange for an agreement by the United States and Relator to release their mortgage interest in the Florida Property, Kmart has offered to pay Plaintiffs (the United States, Relator, and Participating States) \$12,800,000 from the proceeds of the sale of the property at closing. This payment will serve as a partial advance on the second Settlement Payment of \$20,000,000 due on December 22, 2018, pursuant to Paragraph 1 of the Federal Settlement Agreement. The remaining \$7,200,000 for the second Settlement Payment will be paid by Kmart on or before December 22, 2018. In addition, Kmart will deposit \$1,600,000 for the benefit of the United States and Relator in a sole order escrow no later than December 22, 2018. The escrow and the Sears Distribution Center #8975, Road #176 Km 0.5 Cupey Bajo, San Juan, Cupey Ward, Puerto Rico 00926 (the "Puerto Rico

Property”) together will serve as partial security for the third and final Settlement Payment of \$19,000,000 that Kmart will pay Plaintiffs on or before December 22, 2019.

Subject to Kmart’s compliance with the terms outlined above, the United States and Relator agree to amend the payment and security terms in Paragraphs 1 and 2 of the Federal Settlement Agreement as follows:

1. The United States and Relator agree to release the mortgage they hold on the Florida Property at the closing for the sale of the Florida Property in exchange for Kmart’s agreement to pay, as set forth herein, the United States and Relator \$12,800,000 (the “as dark” value of the property) at the closing from the proceeds of the sale of the Florida property.
2. The Parties agree that the executed release of the mortgage held by the United States and Relator on the Florida Property will be held in escrow by Chicago Title & Trust Company until closing, at which time it will be released in exchange for the \$12,800,000 payment.
3. Kmart agrees to pay the remaining \$7,200,000 of the \$20,000,000 second Settlement Payment by December 22, 2018, as required under the Federal Settlement Agreement.
4. Kmart also agrees to deposit \$1,600,000 in a sole order escrow for the benefit of Plaintiffs by December 22, 2018. The escrow, together with the mortgage encumbering the Puerto Rico Property, will serve as the sole security for the third and final Settlement Payment of \$19,000,000 that Kmart will make by December 22, 2019.
5. Kmart hereby declares and affirms that its obligation to deposit \$1,600,000 in a sole order escrow for the benefit of Plaintiffs by December 22, 2018, constitutes an “Obligation” under and secured by that certain Mortgage Note Pledge and Security Agreement dated January 12, 2018, made by Sears Roebuck de Puerto Rico, Inc., as pledgor in favor of the following pledgees: (i) United States of America, acting through the United States Department of Civil Justice, Civil Division; and (ii) Carl Ireland, as administrator of the estate of James Garbe in his role as Relator in the named *qui tam* action (Puerto Rico Mortgage Note Pledge and Security Agreement). See § 3 of the Puerto Rico Mortgage Note Pledge and Security Agreement. By virtue of the Puerto Rico Mortgage Note Pledge and Security Agreement, Sears Roebuck de Puerto Rico, Inc. pledged and assigned to the named pledgees and granted to the pledgees a continuing lien on and security interest in that certain mortgage note in the principal amount of \$17,400,000, bearing Affidavit Number 2888 of Notary Public Miguel Agustín Blanco Fuertes (Puerto Rico Mortgage Note), in turn secured by a fee mortgage encumbering the Puerto Rico Property, constituted pursuant to Deed Number 2 executed on January 12, 2018, before Notary Public Miguel Agustín Blanco Fuertes (Puerto Rico Mortgage and together with the Puerto Rico Mortgage Note Pledge and Security Agreement and the Puerto Rico Mortgage Note, the Puerto Rico Security Documents).
6. Kmart, SHC, and Sears Roebuck de Puerto Rico, Inc. hereby ratify and confirm the pledge and security interest constituted by the Puerto Rico Mortgage Note Pledge and

Security Agreement over the Puerto Rico Mortgage Note as collateral security for all obligations of Kmart under the Federal Settlement Agreement, as modified by this Amendment and, likewise, ratify and confirm the fee mortgage lien of the Puerto Rico Mortgage.

7. Kmart, SHC, and Sears Roebuck de Puerto Rico, Inc. acknowledge and accept that this Amendment does not constitute a novation of the Federal Settlement Agreement.
8. The Parties agree that Kmart's failure to deposit the \$1,600,000 sole order escrow no later than December 22, 2018, would constitute a material breach of the Federal Settlement Agreement, as modified by this Amendment and under the Puerto Rico Security Documents, thus entitling the United States and Relator to all legal remedies under the Puerto Rico Security Documents, including the foreclosure of the pledge over the Puerto Rico Mortgage Note and the foreclosure of the Puerto Rico Mortgage, provided Kmart does not cure such default in its payment obligations within seven (7) days of receiving written notice of the default from the United States. *See* Federal Settlement Agreement ¶ 3.
9. Other than in connection with any prepayment of the third and final Settlement Payment, Kmart agrees not to request the release or substitution of the mortgage held by the United States and Relator on the Puerto Rico Property before December 22, 2019, after Kmart's third and final Settlement Payment is made.
10. At or before closing on the sale of the Florida Property, Kmart shall reimburse Relator's counsel for all attorneys' fees of the Sugar Felsenthal Grais & Helsinger law firm, attorney Miguel Blanco, and JLL appraisers' fees incurred in connection with this Amendment.
11. All other provisions, terms, and conditions contained in the Federal Settlement Agreement, as amended, shall remain in full force and effect.
12. This Amendment is effective on the date of signature of the last signatory. Facsimiles and electronic transmissions of signatures shall constitute acceptable, binding signatures for purposes of this Amendment.

All other terms of the Federal Settlement Agreement remain unchanged and in effect. Please countersign a copy of this letter to confirm Kmart's agreement with the terms outlined above. The counter signature of counsel for Relator to this letter will confirm that Relator also agrees with the terms outlined above.

Sincerely,



Allie Pang  
Trial Attorney  
Commercial Litigation Branch


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AGREED BY:

KMART CORPORATION - DEFENDANT

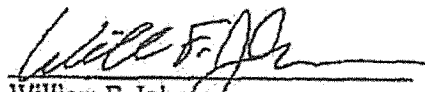
DATED: 8/23/18

BY:

  
Stephen L. Sitley  
General Counsel and Chief Compliance Officer  
Sears Holding Corporation

DATED: 8/23/18

BY:

  
William F. Johnson  
Christopher C. Burris  
King & Spalding LLP  
Counsel for Defendant

SEARS ROEBUCK DE PUERTO RICO, INC. - PUERTO RICO SECURITY PROVIDER

DATED: 8/23/18

BY:


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CARL IRELAND - RELATOR

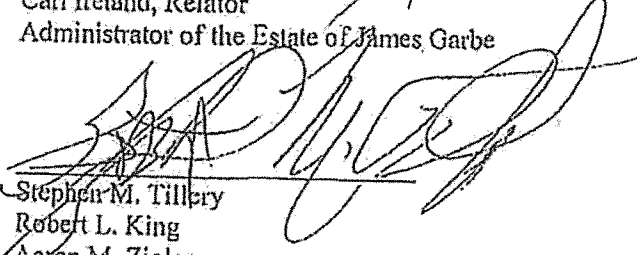
DATED: 8-23-18

BY:

  
Carl Ireland, Relator  
Administrator of the Estate of James Garbe

DATED: 8/23/18

BY:

  
Stephen M. Tillery  
Robert L. King  
Aaron M. Zigler  
Peter O. Rocque  
Korein Tillery LLC  
Counsel for Relator